

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA,

vs.

ERIC ROBERT RUDOLPH,

Defendant.

Case No. CR-00-S-422-S

**ENTERED**

**JUN 15 2004**

ORDER

This cause is before the court on the defendant's *ex parte* motion for the issuance of a Rule 17(c) subpoena *duces tecum* to the Birmingham Post Herald newspaper for the production of photographs taken by the newspaper in the area of and during the time immediately following the bombing of the New Woman All Women Health Care Clinic on January 29, 1998. Although the court agrees that such photographs, to the extent any of them were published, meet the evidentiary standard of United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), for the issuance of a Rule 17(c) subpoena *duces tecum*, the court does not agree that either the application for the subpoena, the subpoena itself, or any documents produced in response to it may remain under seal and unknown to the Government.

To be entitled to use Rule 17(c), the defendant must show that the requested subpoena seeks documents that are (1) relevant to his defense, (2) admissible as evidence (not merely discovery), and (3) specifically identified (not a general "fishing expedition"). Bowman Dairy Co. v. United States, 341 U.S. 214, 71 S. Ct. 675, 95 L. Ed. 879 (1951). The purpose of the subpoena is to bring into court documents or things a party believes he may use *as evidence*; its purpose is not to provide a mechanism for a defendant to secure the production of a document for discovery purposes. A

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defendant may not use Rule 17(c) to gain access to a document in order to review it to determine *whether* he wants to use it as evidence; there must be a good faith belief that the subpoenaed document will be used as evidence and that it must be secured *for that purpose*.

Here, defendant seeks photographs purportedly taken by the Birmingham Post Herald immediately following the bombing, some of which were actually published in an early edition before being removed or replaced in later editions. These photographs are sought in support of the defendant's motion for change of venue on the theory that the publication of "grotesque" photographs has contributed to a climate of bias against him. Thus, insofar as defendant wishes to use these actually published photographs as evidence in support of his motion for change of venue, he has properly established that they are relevant and evidentiary, and his request for them is specific. Consequently, the request for the issuance of the Rule 17(c) subpoena to the Birmingham Post Herald for photographs taken on January 29, 1998, in the area of the bombing *and which were actually published*,<sup>1</sup> is due to be and hereby is GRANTED. The Clerk is DIRECTED to issue the proposed subpoena attached to the motion, but with a response date of June 22, 2004, at the Federal Courthouse in Huntsville, Alabama, where the motion for change of venue will be heard.

The court also is convinced that neither the application for the subpoena nor the subpoena itself should remain under seal or be treated *ex parte*. The application does not reveal any defense strategy other than the self-evident strategy that defendant will attempt to prove that media coverage of this crime has created an atmosphere of bias against him. That certainly comes as no surprise to

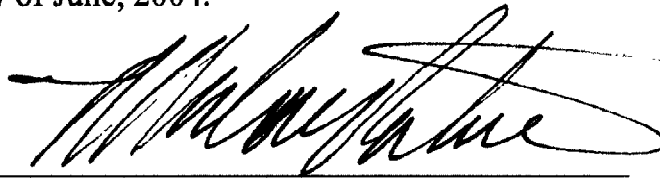
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<sup>1</sup> Only those photographs *actually published* need be produced. As evidence relevant to the defendant's motion for change of venue, only photographs actually published could have any effect on the level, intensity, and tenor of publicity surrounding this case. Photographs taken, but never published, could have not have effected any potential juror that might be called in this case.

the Government. Further, defendant's request that the subpoena and the documents produced in response to it be handled *ex parte* until his defense team can decide whether or not to use the photographs, runs counter to the explicit language of the rule and its very purpose. Rule 17(c) plainly states that both parties are entitled to examine any documents produced in response to it, in anticipation and preparation for actually offering them as evidence. Because the purpose of the rule is to secure the production of *evidence*, and not as a mechanism for pretrial discovery, documents responsive to the subpoena are open for review by all parties in the litigation; the subpoenaing party, whether the defendant or the Government, does not have a monopoly over whether the documents can be seen by the opposing side. Consequently, the defendant's *ex parte* application for this Rule 17(c) subpoena (Doc. 219) is hereby UNSEALED, as is the subpoena to be issued and any photographs responsive to it.

The Clerk is DIRECTED to forward a copy of the foregoing to all counsel of record.

DONE this the 14<sup>th</sup> day of June, 2004.

A handwritten signature in black ink, appearing to read 'T. Michael Putnam', written over a horizontal line.

T. MICHAEL PUTNAM  
UNITED STATES MAGISTRATE JUDGE